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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 61

OKLAHOMA PRESS PUBLISHING COMPANY,
Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER, OKLAHOMA PRESS PUBLISHING COMPANY

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OPINIONS BELOW

The opinion of the District Court (R. 53-56) is as yet unreported. The opinion of the Circuit Court of Appeals (R. 63-71) is reported in 147 F. 2d 658.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 15, 1945 (R. 71). Petition for a writ of certiorari was filed on April 16, 1945, and certiorari was granted on May 21, 1945.

The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. Sec. 347 (a)).

QUESTIONS PRESENTED

1. Whether in a proceeding instituted for the purpose of compelling compliance with the commands of a subpoena duces tecum, the respondent therein in response to an order to show cause is barred from making the defense that it is not subject to the Act involved.

2. Whether petitioner is engaged in commerce or in the production of goods for commerce within the meaning of the Act.

3. Whether Congress, in the light of the prohibition of the First Amendment against the abridgment of the freedom of the press by any form of restraint whatsoever, has the power to apply the Act to the newspaper publishing business of petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are Article I, Section 8, Clause 3 of the Constitution of the United States and the First, Fourth and Fifth Amendments to the Constitution of the United States. These provisions are set forth in the Appendix at page 23.

The statutory provisions involved are those embraced in the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29

U. S. C. Sec. 201 *et seq.*) and Sections 9 and 10 of the Federal Trade Commission Act (38 Stat. 717, 722-723, 15 U. S. C. Secs. 49 and 50). These provisions are set forth in the Appendix at page 24.

STATEMENT

Petitioner is engaged at Muskogee, Oklahoma, in the business of publishing two daily newspapers—the Muskogee Daily Phoenix which is published each morning and the Muskogee Times-Democrat which is published each evening except Sunday (R. 54). The total net paid circulation of the Muskogee Daily Phoenix as of September, 1943, was 12,172 (R. 44, 54). The total net paid circulation of the Muskogee Times-Democrat as of the same date was 9,491. Since June 1, 1939, no papers have been sold by petitioner outside the State of Oklahoma (R. 44, 54). Petitioner mails daily, without charge, to Muskogee residents now in the armed forces approximately 17 copies of the Muskogee Times-Democrat and 120 copies of the Muskogee Daily Phoenix (R. 20, 42, 45-46, 54). Petitioner also mails, without charge, approximately 67 copies to its out of state representative for advertisers (R. 20, 42-43, 46, 54-55).

On June 3 and 4, 1943, one Erle P. Bryan, representing himself to be a duly authorized representative of the Administrator of the Wage and Hour Division, appeared at petitioner's office and sought to make an inspection of petitioner's books and records. Petitioner refused to permit any such search (R. 10, 20-21).

On November 3, 1943, a duplicate original of a paper purporting to be a subpoena duces tecum signed by L. Metcalfe Walling, Administrator of the Wage and Hour Division, requiring petitioner to appear before officers of the Wage and Hour Division on November 17, 1943, to produce certain requested material was served upon one Franklin E. Katterjohn (R. 7, 21). Said Katterjohn was not and never

has been a stockholder, director or officer of petitioner and has no control over the books, records and documents described in said purported subpoena duces tecum (R. 21-22). No one representing petitioner answered the purported subpoena duces tecum (R. 13-14).

L. Metcalfe Walling then made application to the District Court for the Eastern District of Oklahoma on January 29, 1944, for an order enforcing the aforesaid subpoena duces tecum (R. 5-9).

Upon an ex parte showing the District Court issued an order directing petitioner to show cause on February 18, 1944, why an order should not issue requiring it to comply with the aforesaid subpoena (R. 14-15). Time for filing an answer was extended to March 9, 1944.

In its return to the order to show cause and answer to the petition of the Administrator for enforcement of the purported subpoena petitioner denied essential jurisdictional facts, namely, that the Act is applicable to the business of petitioner; that the Administrator has jurisdiction over petitioner's affairs; and that the court had jurisdiction in the premises (R. 16-17). Petitioner also asserted as defenses that the attempted application of the Act to its business violated its rights as guaranteed by the First, Fourth and Fifth Amendments to the Constitution of the United States (R. 16-17).

The case was heard on March 9, 1944, by Judge Eugene Rice (R. 49-50).

Evidence in support of petitioner's defenses that it is not subject to the Act was received by the District Court and neither challenged nor denied by respondent herein. In fact the Administrator admitted the facts as to petitioner's operations and the District Court so found (R. 54). After consideration of all the evidence, the District Court held petitioner was subject to the Act and that the rule to show

cause was properly issued. On June 12, 1944, it entered an order requiring petitioner to give the Administrator access to the books and records prayed for in the subpoena (R. 56-57).

Petitioner appealed to the United States Circuit Court of Appeals for the Tenth Circuit. Argument on appeal was heard on November 15, 1944, in Wichita, Kansas. On February 15, 1945, the Circuit Court affirmed the judgment of the District Court.

The Circuit Court, in its decision, by-passed the undisputed facts in the record pertaining to coverage. It held that the Administrator upon an allegation based on information and belief only is empowered to make an investigation such as he sought herein and that "It is time enough to consider that question (coverage) when all the evidence sought to be produced by the subpoena is before the court in a proceeding directly involving violations based on coverage." (R. 71.)

Petitioner filed a petition for a writ of certiorari with this Court on April 16, 1945, and certiorari was granted on May 21, 1945.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Administrator is entitled to an order enforcing an investigatory subpoena without a judicial adjudication that the industry sought to be investigated is subject to the Act.

2. In refusing, in the light of the record before it, to pass upon the merits of the case.

3. In holding that the application of the Act to the newspaper publishing business did not violate the constitutional guaranty of a free press and in overlooking the fact that the Act attempts to classify and thus to regulate the press

in violation of the guaranties of the First and Fifth Amendments.

4. In affirming the order of the District Court.

SUMMARY OF ARGUMENT

Point 1. The decision of the Circuit Court to permit the Administrator to search petitioner's books and records without a judicial determination that petitioner is subject to the Act and to determine the question of coverage only in a proceeding directly involving violations of the Act violates petitioner's rights as guaranteed by the Fourth Amendment. This decision cannot be justified on the ground of administrative expediency for all of the facts necessary to a determination of coverage were before the Circuit Court and its postponement of that determination did not actually speed administration of the Act. This decision, if upheld, will permit the Administrator to continue his wholesale investigations of all businesses without regard for the fact that the business investigated is not subject to the Act. A citizen not covered by the Act may be continually harassed by these unauthorized inspections and yet be unable to free himself if he is barred from raising the issue as to the right to inspect. No lawful purpose can be served by these unauthorized inspections and so petitioner should be permitted to bar this illegal entry at the threshold.

Point 2. Petitioner is not subject to the Act for it is not engaged in commerce or in the production of goods for commerce within the meaning of the Act. There is a definite "break" or termination of the interstate movement of the materials which petitioner receives from out of state. These materials are processed by independent acts of a local nature into an entirely new product before they are passed on to petitioner's readers. The business of pre-

paring a local newspaper is a strictly local business and thus not within the coverage of the Act. The mailing of a few complimentary copies out of state does not bring petitioner within the purview of the Act. The Act was designed to put a stop to nation-wide competition in goods produced under substandard labor conditions and petitioner is in no sense engaged in interstate competition with other newspapers. Furthermore, this out of state circulation which is not paid for is so small it falls within the *de minimis* doctrine.

Point 3. The Circuit Court erred in holding that the application of the Act to petitioner did not constitute a violation of the freedom of the press. Under this Court's decision in *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943), this Act must be nullified as to the press because it lays a direct burden on the press. First, its application to the newspaper publishing business may make it financially impossible for a publisher to serve his readers adequately because of the burdens imposed if his staff is kept on the flexible schedule necessary to complete news coverage. Secondly, a publisher unable to operate successfully under the Act may find it necessary to withdraw himself from its coverage by eliminating his out of state subscribers. Furthermore, this Act does not treat all newspapers alike but classifies them for the purpose of regulation. This Court has held that classification of newspapers for the purpose of regulation violates the First Amendment. *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936).

Point 4. Under the terms of the Act, many of petitioner's competitors in the vicinity of Muskogee are exempt from the burdens of the Act. Petitioner is engaged in exactly the same business as these competitors. The application of the terms of the Act to petitioner while its competitors are exempted constitutes an unreasonable, arbitrary and

injurious discrimination in violation of its rights as guaranteed by the First and Fifth Amendments and is in conflict with the principles announced by this Court in *Grosjean v. American Press Co., supra.*

ARGUMENT

Point 1

The Circuit Court erred in holding that the Administrator is entitled to an order enforcing an investigatory subpoena without a judicial adjudication that the industry sought to be investigated is subject to the Act.

Section 11 (a) of the Act authorizes the Administrator to make investigations "in any industry subject to this Act" and Section 11 (c) requires that "every employer subject to any provisions of this Act" shall make and keep certain records. The Administrator, purporting to act under authority conferred by this statute, issued an alleged subpoena duces tecum in an attempt to inspect petitioner's books and records without making any formal determination or showing that petitioner's business is an "industry subject to this Act" or that petitioner is an "employer subject to any provisions of this Act" (R. 33).

Petitioner refused to obey the alleged subpoena duces tecum on the ground that since neither it nor its employees were subject to the Act the Administrator was without authority to inspect its books and records. In its return and answer to the order to show cause in the District Court petitioner denied: that the Act is applicable to the business of petitioner; that the Administrator has jurisdiction over petitioner's affairs; and that the District Court had jurisdiction in the premises. It also alleged that the attempted application of the Act to its business violates its rights as guaranteed by the First, Fourth and Fifth Amendments to the Constitution of the United States (R. 16-17). Peti-

tioner contended that these denials and allegations tendered issues of fact and law which the District Court was under a duty to determine at the outset of the proceedings. The District Court received evidence in support of all of petitioner's defenses, which were neither challenged nor denied by the Administrator. Furthermore, the District Court found that there is no dispute as to the facts and that the Administrator admitted for the purpose of the hearing that the petitioner conducts its business as set forth in the affidavits attached to its return to the order to show cause and its answer (R. 54). The District Court then held that petitioner was subject to the Act and ordered it to comply with the subpoena.

On appeal to the Circuit Court, petitioner again contended that it was the duty of the court to pass upon the question of coverage before ordering compliance with the subpoena. Petitioner argued that a hearing on an order to show cause is only an empty form if at that time the respondent is not permitted to make any defense as to compliance with the Act or as to coverage.

The Circuit Court in its decision by-passed this question of coverage, stating "It is time enough to consider that question when all the evidence sought to be produced by the subpoena is before the court in a proceeding directly involving violations based on coverage." (R. 71.) It held, on authority of *Walling* v. *Benson*, 137 F. 2d 501 (C. C. A. 8th, 1943), that petitioner was not entitled to an adjudication of actual coverage and that it was only necessary that the District Court have assurance "reasonable grounds exist for making the investigation." The Circuit Court further held that the Administrator's assertions on information and belief that petitioner is subject to the Act constitute a sufficient showing of "reasonable grounds."

This decision is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *General Tobacco*

& Grocery Co. v. *Fleming*, 125 F. 2d 596 (1942). In that case which arose under the same provisions of the Act as the controversy herein, the court held that where the answer of the respondent tenders an issue of fact on the jurisdictional question of interstate commerce the Administrator must show that the respondent is engaged in interstate commerce or in the production of goods for commerce. The court said:

> "* * * It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects." (125 F. 2d at p. 599.)

Since under the terms of the Act, the Administrator is only authorized to inspect industries subject to the Act, no lawful purpose could be served by permitting him to inspect industries not actually subject to the Act. The court, therefore, should determine the question of coverage at the outset of the proceeding. It is axiomatic that the time to stop the trespasser is at the threshold.

The more recent decision of the Sixth Circuit Court in *Walling* v. *LaBelle Steamship Co.*, 148 F. 2d 198 (1945), in no sense overrules its prior decision in the *General Tobacco Co.* case. In the *LaBelle Steamship Co.* case respondent, admittedly engaged in interstate commerce, resisted an attempted investigation by the Administrator on the ground that its employees were exempt from the Act as seamen. The court, in holding that respondent was not entitled to have the issue of coverage of its individual employees tried in this proceeding, distinguished the case from the *General Tobacco Co.* case in which the employer denied that it was

engaged in commerce or in the production of goods for commerce. Cases such as the *General Tobacco Co.* case and the present proceeding in which petitioner denied that it was engaged in commerce or in the production of goods for commerce and that it was subject to the Act are clearly distinguishable from cases in which part of a business is subject to the Act and only certain employees are exempt from its provisions.

The holding of the Circuit Court cannot be justified on the basis of administrative expediency, for all of the facts necessary for a decision on the merits were before the court. The District Court in its finding of fact No. 6 (R. 55) said:

> "The affidavits of the Respective parties are hereby made a part of the findings of fact by reference. It has been the purpose of the court to include in this statement the essential facts for decision herein. If any fact contained in the affidavits has been omitted it is hereby incorporated herein by reference and made a part hereof."

The Circuit Court should have decided the issue of coverage. The facts on this issue were complete in the record, where they still stand unchallenged and undenied. The Circuit Court's refusal to pass upon coverage, if upheld by this Court, has created a situation under which the Administrator may continue to ignore the commands of the statute and persist in flaunting the oft expressed policy of Congress condemning his attempted wholesale investigation of every person engaged in business in the United States.

Unless this decision be reversed, no person, even though specifically exempted by the precise terms of the Act or wholly outside its scope, can successfully resist a demand for investigation at any time it is made. If a citizen refuses admission to his inspectors, all the Administrator

need do under this decision is to allege upon information and belief—and without any facts whatsoever to support the allegation—that the person sought to be investigated is subject to the Act and the court ipso facto must grant his application for enforcement of the subpoena.

The citizen in answer to an order to show cause may show, as did petitioner herein, that he is neither engaged in commerce nor in producing goods for commerce. He may show he is exempt by the precise terms of Section 13. But, in either event, under this decision, he cannot drive the trespasser from his threshold and bar him from illegal entry.

The Administrator's intention to inspect everyone doing business as a routine matter of enforcement is undenied (R. 33-37).

Congress has condemned this procedure (R. 37-38).

Notwithstanding this condemnation by Congress, the Administrator has persisted in his course (R. 38). [Also, see record in *News Printing Co., Inc.* v. *Walling*, No. 63 this term, where the District Court found the investigation was initiated in the absence of complaint or charge of violation of law and solely as a matter of routine in hope something would turn up.]

If upheld, the Circuit Court's decision to try the issue of coverage only in a "proceeding directly involving violations" will force a citizen harassed by inspectors to violate the law deliberately in order to have the question of coverage determined. In the event that the Administrator ignored a single or infrequent deliberate violation the citizen would have to adopt deliberately a course of repeated violations to obtain access to a forum in which his rights could be determined. Surely Congress never intended that a citizen would have to violate the law deliberately in order to secure for himself the rights guaranteed by the Federal

Constitution. A citizen not subject to the Act cannot violate its terms and may never be able to free himself from the demands of investigators if he is barred from raising the issue as to their right to inspect.

The Circuit Court's decision must be condemned because it sacrificed petitioner's rights for administrative expediency. It must also be condemned because, as a practical matter, it will not speed administration of the Act. The only forum in which the question of coverage under the Fair Labor Standards Act can be determined is the court. Since the facts necessary to a determination of that question were before the court below, there was no justification for its decision to postpone that determination and to subject petitioner to an unwarranted invasion of the rights guaranteed it by the Fourth Amendment.

POINT 2

The record in the present case does not furnish reasonable grounds to believe petitioner is within the Act but, on the contrary, establishes that petitioner is not engaged in commerce or in the production of goods for commerce.

If the Circuit Court of Appeals had considered the merits of the case as presented in the record, it would have found that petitioner is not engaged in commerce or in the production of goods for commerce within the meaning of the Act.

The fact that petitioner receives news, feature articles and materials from out of state does not bring petitioner within the coverage of the Act. This Court, in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 (1943), at page 571, stated that "* * * we cannot conclude that all phases of a wholesale business selling intrastate are covered by the Act solely because it makes its purchases interstate." And, in the companion case, *Higgins* v. *Carr Brothers Co.*, 317 U. S. 572 (1943), the Court held the Act inapplicable to a business

which imported materials from out of state where the goods came to rest within the state and there was no actual or practical continuity of movement of materials from without the state to customers within the state.

In the present case there is a definite "break" or termination of the interstate movement of materials which petitioner receives from out of state. Petitioner receives its out of state news on an automatic teletype machine which requires no one to operate it (R. 23, 47-48, 55). Portions of this news are then selected, edited and published in petitioner's newspapers (R. 23-24, 48). The supplies which come to petitioner from out of state are processed by independent acts of a purely local nature into an entirely new article which petitioner then sells to its readers.

The fact that a newspaper publisher does not merely pass on to his readers the materials which he has received but sells them an entirely new article was recognized by the United States Court of Appeals for the Fourth Circuit in *Schroepfer* v. *A. S. Abell Co.*, 138 F. 2d 111 (1943) (certiorari denied, January 17, 1944; rehearing denied, May 22, 1944), when it stated:

> "* * * there can be no question but that the interstate movement of materials used in the publication of papers, including news reports and other matter published, ended when they were delivered to defendant. Defendant used them as it saw fit in producing its papers and did not pass them on to its customers, as a telegraph company or a news service might have done. What occurred, therefore, was not mere 'milling in transit' but the production of an entirely new article of commerce in which the news received interstate was merely one of the ingredients." (138 F. 2d at p. 114.)

The New York Supreme Court, Appellate Division, in its decision in *Mabee* v. *White Plains Publishing Company, Inc.*, 267 App. Div. 284, 45 N. Y. S. 2d 479 (1943), which was unanimously affirmed by the Court of Appeals, 293 N. Y. 781

(1944), followed the *Schroepfer* decision and rejected the contention that the receipt of materials from out of state for use in the production of a newspaper brought the newspaper within the coverage of the Act.

This Court has held that the business of preparing, printing and publishing a newspaper is peculiarly local and distinct from its circulation, whether or not that circulation crosses state lines. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938). See also *Blumenstock* v. *Curtis Publishing Co.*, 252 U. S. 436 (1920).

As the court pointed out in *Mabee* v. *White Plains Publishing Company, Inc.*, *supra*, the business of publishing a local newspaper is a "strictly local as distinguished from a national activity" and is not covered by the Act. Petitioner here is engaged in a local activity. Its newspapers are designed primarily to serve the residents of Muskogee and vicinity. Thus, it falls within the category of local business which Congress left to the protection of the states. *Walling* v. *Jacksonville Paper Co., supra.* And, as this Court recently pointed out in *10 East 40th Street Building, Inc.* v. *Charles Callus et al.*, 89 L. ed. 1244 (1945) (advance opinions), courts must be alert "not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation."

The mailing, without charge, of a small per cent of its total circulation to residents of Muskogee in the armed forces and to its out of state advertising representative does not change petitioner's business from an intrastate business to an interstate one within the purview of the Act.[1]

The congressional hearings on the Fair Labor Standards Act plainly indicate that the purpose of this Act was to pro-

[1] The Administrator has ruled that small weeklies do not lose their exemptions under Section 13 (a) (8) of the Act because of their willingness to send either paid or free subscriptions to members of the armed forces. See Point 4, infra, for a discussion of this policy.

tect and foster interstate commerce by the suppression of competition by goods produced under low wage conditions with those produced by employees working under adequate standards. And, this Court in *United States* v. *Darby*, 312 U. S. 100 (1941), stated that the Act was designed to eliminate "the spread of substandard labor conditions through the use of the facilities of interstate commerce *for competition* by the goods so produced with those produced under the prescribed or better labor conditions * * *." (312 U. S. at p. 122.) (Emphasis supplied.) In mailing complimentary copies out of state to residents of Muskogee serving our Nation, petitioner is in no sense competing interstate with other newspapers and it is not engaged in commerce or in producing goods for commerce within the meaning and purpose of the Act.

In any event, if the mailing of these complimentary copies should be held to place petitioner in commerce then this case would fall within the *de minimis* doctrine.

This Court in *N. L. R. B.* v. *Fainblatt*, 306 U. S. 601 (1939), recognized that there were cases arising under the National Labor Relations Act in which the courts would apply the *de minimis* doctrine. Since, as the Court pointed out in *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517 (1942), and *Walling* v. *Jacksonville Paper Co., supra*, the Fair Labor Standards Act is not as broad in its scope as the National Labor Relations Act, it is clear that there are cases arising under the Fair Labor Standards Act in which the courts should apply the doctrine of *de minimis*.

In a number of cases arising under the Act, the courts have applied this doctrine by holding that where the interstate business of the employer constitutes only a small portion of the total business and where it is not an integral part of the service rendered the Act does not apply. *Goldberg* v. *Worman*, 37 F. Supp. 778 (S. D. Florida, March 18, 1941); *Rauhoff* v. *Henry Gramling & Co.*, 42 F. Supp. 754 (E. D.

Arkansas, August 22, 1941); *Zehring* v. *Brown Materials*, 48 F. Supp. 740 (S. D. California, January 19, 1943); *Cron* v. *Goodyear Tire & Rubber Co.*, 49 F. Supp. 1013 (M. D. Tennessee, April 28, 1943); *Sapp et al.* v. *Horton's Laundry*, 56 F. Supp. 901 (N. D. Georgia, January 18, 1944); *Mabee* v. *White Plains Publishing Company, Inc., supra.*

Since the record before it showed petitioner is not engaged in commerce or in the production of goods for commerce within the Act, the Circuit Court of Appeals erred in holding the Administrator had reasonable grounds to believe that petitioner was subject to the Act. Its refusal to pass upon the merits of petitioner's defenses was arbitrary and capricious.

POINT 3

The Circuit Court erred in holding that the application of the Act to petitioner did not constitute an abridgment of the constitutional guaranty of the freedom of the press.

The holding of the Circuit Court of Appeals that the provisions of the Act can be applied to petitioner's newspaper publishing business is, in effect, a holding that Congress in the exercise of its regulatory powers derived from Article I, Section 8, Clause 3 of the Constitution can nullify the prohibitions against restraints of the press embraced in the First Amendment to the Constitution.

The Act here in controversy is not a general law affecting all persons alike. Section 13 of the Act exempts many types of employees from the so-called "benefits" of the Act. Furthermore, it exempts numerous entire businesses and industries from the burdens of the Act. Still further, as originally enacted, only one business in the entire range of business and industry was classified in the Act for the purpose of regulation.

That business was the newspaper publishing business.

Under the provisions of Section 13 (a) (8) all weekly and semi-weekly newspapers with a circulation of less than

3,000, the major part of which circulation is within the county where printed and published, are exempted from the minimum wage and overtime provisions of Sections 6 and 7 of the Act. All other newspapers whether weekly, semi-weekly, tri-weekly, daily, Sunday or daily and Sunday are subjected to the burdens of Sections 6 and 7 of the Act.

A study conducted by the Wage and Hour Division shows that of a total of 13,476 newspapers published in 1938, daily, daily and Sunday, weekly, semi-weekly and tri-weekly, 10,379, or 77 per cent of the total, had circulations under 3,000, while 11,496, or 85 per cent of the total, had circulations under 5,000. In the weekly, semi-weekly, and tri-weekly fields 9,775 or 91 per cent of the total in these fields, had circulations under 3,000. In the daily field 521, or 25 per cent of all dailies, had circulations under 3,000 and in the Sunday field 101, or 17 per cent of all Sundays, had circulations under 3,000.

In the group between 3,000 and 5,000 circulation, 489 were weeklies and 467 dailies.

In the group between 5,000 and 10,000 circulation, 233 were weeklies, semi-weeklies and tri-weeklies and 455 dailies. Only 654 dailies and 218 weeklies, semi-weeklies and tri-weeklies had over 10,000 circulation. Practically all of 9,755 weekly and semi-weekly newspapers have less than 3,000 circulation. These, constituting 72 per cent of all newspapers published in the United States and 91 per cent of all weekly and semi-weekly newspapers published in the United States, are exempted from the burdens of the Act (Small Daily Newspapers Under Fair Labor Standards Act, Wage and Hour Economics Division, June, 1942).

Analysis of the provisions of Section 13 (a) (8) shows that Congress classified the press for the purposes of the regulation provided in this Act on the basis of volume of circulation, frequency of issue and area of distribution.

The Circuit Court erred in holding that a newspaper has no special immunity from the application of general laws. This Court has held, in *Murdock* v. *Pennsylvania, supra,* that even a general law applying to all persons alike if it lays a direct burden on the business of the press must be nullified as to the press by reason of the prohibition against restraint contained in the First Amendment.

This Act lays a direct burden on the press. The business of preparing and printing a daily newspaper is peculiar in that it demands a high degree of flexibility in operation (R. 29-30). If a publisher is limited in his operations by the application of the burdens of this Act, he will be unable to serve his readers adequately.

Newspapers which are unable to operate successfully under this Act will be forced to restrict circulation. Petitioner here sought to remove itself from the possible application of this law by eliminating its out of state subscribers. If it is held that the Act can now be applied to petitioner, petitioner will be compelled to discontinue its practice of sending free copies to Muskogee residents who are now serving in their country's armed forces. This will deprive these persons of a service to which they are entitled under the provisions of the First Amendment which was written not to guarantee a special privilege to persons engaged in a particular type of business but to guarantee to the citizens of this country the right to have information of vital public importance free from government control or restraint. This Court has held that such restriction of circulation violates the guaranty of the First Amendment. *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Schneider* v. *State,* 308 U. S. 147 (1939); *Near* v. *Minnesota,* 283 U. S. 697 (1931); and *Grosjean* v. *American Press Co., supra.*

Furthermore, the court below overlooked the fact that the Act regulates the press by classifying it. If Congress has

the power to classify the press as it has done here it can exercise that power so as to benefit or burden any portion of the press it so desires. This is obvious from the very nature of the factors used by Congress for its classification.

The use of one of these factors, the only one used in fact by the State Legislature of Louisiana, was condemned by this Court in *Grosjean* v. *American Press Co., supra.*

The notorious Huey Long legislature when it sought to penalize those newspapers in Louisiana which were opposed to the Long regime enacted a tax law aimed at silencing the anti-Long press. The legislature classified the press of Louisiana on the single basis of volume of circulation, levying the tax on all newspapers with a circulation in excess of 20,000 per week and exempting all newspapers in Louisiana with a circulation less than 20,000 per week.

In this Act Congress has not only applied volume of circulation as used by the Louisiana legislature as one of its factors for classifying the press but has added two more, namely, frequency of issue and the area in which a newspaper is distributed. The very use of these factors serves to restrict circulation and deprive the people of their rights to information which our forefathers guaranteed them under the First Amendment.

That Amendment prohibits any such exercise of the power here asserted by Congress.

Point 4

Application of Sections 6 and 7 to petitioner's business would constitute an unreasonable, arbitrary and injurious discrimination against petitioner in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution.

As has been pointed out hereinbefore Section 13 (a) (8) of the Act classifies the press on the basis of volume of cir-

culation, frequency of issue and area of distribution in such a way as to exempt from the burdens of Sections 6 and 7 more than 72 per cent of all newspapers published in the United States.

Among the newspapers freed from those burdens are many weekly newspapers published in the vicinity of Muskogee (R. 43, 46). The business of these weekly newspapers is exactly the same as that of petitioner (R. 27). The Administrator of the Wage and Hour Division has stated that he will not consider that any of these small newspapers will lose its exemption merely because of its willingness to supply the hometown paper either free or by paid subscription to members of the armed forces and that limits in circulation contained in Section 13 (a) (8) are to be exclusive of such subscriptions. (See F. L. S. A. Status of Small Newspapers, 6 Wage and Hour Reporter 730.)

Therefore, it follows that the application of Sections 6 and 7 to petitioner whose out of state circulation consists only of free subscriptions to members of the armed forces would constitute an unreasonable, arbitrary and injurious discrimination in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution and in conflict with the principles announced by this Court in *Grosjean* v. *American Press Co., supra.*

CONCLUSION

It is respectfully submitted that on the record and the authorities cited the Administrator was without authority to inspect petitioner's books and records and the Circuit Court's holding that he may make such an inspection was a flagrant violation of petitioner's rights as guaranteed by the Constitution. This Court should reverse the Circuit

Court and grant such other and further relief as to the Court may seem proper.

Respectfully submitted,

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APPENDIX

Constitutional Provisions Involved

The constitutional provisions involved are Article I, Section 8 of the Constitution of the United States and the First, Fourth and Fifth Amendments to the Constitution of the United States.

Article I, Section 8 of the Constitution of the United States provides that:

"The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *."

The First Amendment to the Constitution of the United States provides that:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment to the Constitution of the United States provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides that:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case

to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutory Provisions Involved

The statutory provisions involved are those embraced in the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C., Sec. 201 *et seq.*) and in Sections 9 and 10 of the Federal Trade Commission Act (38 Stat. 722-723; 15 U.S.C., Secs. 49 and 50).

A copy of the Fair Labor Standards Act is bound in as a part of this Appendix beginning at page 29.

Sections 9 and 10 of the Federal Trade Commission Act provide that:

"Sec. 9. For the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the

commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

"Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of the Act or any order of the commission made in pursuance thereof.

"The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

"Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

"No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testify-

ing shall be exempt from prosecution and punishment for perjury committed in so testifying.

"Sec. 10. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

"Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

"If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the

Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

"Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court."

[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying,

the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodg-

ing, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee,

and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages tobe paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.[1]

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.[1]

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (c).[1]

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from

time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such

recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the

petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize

the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or

byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.[1]

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any

[1] Amendment provided by Act of August 9, 1939 (Public No. 344, 76th Congress, 53 Stat. 1268).

goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The count in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.

[PUBLIC LAW 283—77TH CONGRESS]

[CHAPTER 461—1ST SESSION]

[S. 1713]

AN ACT

To amend Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph (2) of subsection (b) of section 7 of Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938, is hereby amended to read as follows:

"(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks, or".

Approved, October 29, 1941.